**SHAMALA SATHIYASEELAN**

**v.**

**DR JEYAGANESH C MOGARAJAH**

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: S8-24-3586-02]
20 JULY 2004

***FAMILY LAW:*** *Children - Custody - Infant children of Hindu marriage - Application for custody by wife after husband converted himself and children to Islam - Whether wife had daily care and control of children - Whether wife had right to actual custody - Whether legal custody jointly to both husband and wife - Whether right to actual custody lost if wife influenced children's religious beliefs - Law Reform (Marriage and Divorce) Act 1976, ss. 88 - Guardianship of Infants Act 1961, s. 5*

This was an *inter parte* custody application by the mother of two infant children of a Hindu marriage ('the infant children') after the father had converted himself and the infant children to the Islamic faith without her consent. This court had earlier ruled the following: (1) that the *ex parte* order for custody obtained by the father from the Selangor Syariah High Court was not binding on the mother as she was a Hindu; (2) that the Hindu marriage of the parties was not dissolved upon the father converting to Islam and that it only provided a ground for the mother to petition for divorce; and (3) that the civil court had no jurisdiction to hear the mother's application for a declaration that the conversion of the infant children to Islam was null and void (see [2004] 1 CLJ 505 and [2004] 2 CLJ 416).

**Held (granting legal custody jointly to both father and mother but actual custody to mother only):**

**[1]** Under s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 there is a rebuttable presumption that a child below seven years of age shall be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. The infant children in the present case have been in the physical custody of the mother since birth. Even though s. 88(3) is a rebuttable presumption, strong grounds are required to rebut the presumption. (pp 523 h & 524 a)

**[2]** The elder of the infant children attended a kindergarten near the mother's home. It must be acknowledged that changing the *status quo* would disrupt the infant children and thus compound the difficulties of adjusting to their parent's separation. So in this case, the mother who was already looking after them would have a much stronger claim. The mother was the best able to care for the infant children. On the other hand, the father had left them and had adopted a different lifestyle from the one the infant children were familiar with. He had walked out on them and put the interests of one Ros Salina bte Nayan above theirs. (pp 524 h & 524 a-c)

**[3]** The welfare of the infant children was best protected if they retained the link with both their parents. Despite the conversion, the infant children would cope much better with the trauma of separation if they continued to have regular contact with their father and mother. They would be assured that despite the breakdown in their parents' relationship, their parents were still there for them and that they still loved them. (pp 525 e-g)

**[4]** Parental authority should yield to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence. Whether a child has sufficient understanding and intelligence is a question of fact depending on the issues involved and the child's emotional and intellectual maturity. The older the child the more persuasive his views. (p 526 b-d)

**[5]** The infant children since birth were brought up in the Hindu religious belief by their Hindu parents until the father became a muallaf and subsequently converted them. It must be emphasised that they were not born to Muslim parents. Further, in a proceeding relating to custody, care and control of children, the welfare of the children are paramount and the question of religion is merely one factor to be balanced against the others. It is not for the Family Court to prefer one religion to another. However, the Family Court can be permitted to examine the tenets and practices of a particular faith for the purpose of deciding custody, care and control. (p 526 e-f & 527 c-e)

**[6]** The shafie, one of four schools that enunciated fundamental Islamic principles states that no non-Muslim woman is qualified for the custody of a Muslim child born to a Muslim father. In this case, the infant children were not born to a Muslim father. The father was still a Hindu when they were born. In the circumstances, the mother was best entitled to custody of the infant children. Nothing could take them away from her except for her own misconduct. It made no difference whether she was a Muslim or non-Muslim. (pp 530 a-d)

**[7]** The infant children were converted to Islam in a shroud of secrecy. There appeared to be a deliberate attempt to conceal the said conversion from the mother. Section 5 of the Guardianship Infants Act 1961 gave both parents equal parental rights and authority in relation to the custody or upbringing of the infant children. (p 531 b-e, g)

**[8]** The father had unilaterally converted the infant children soon after his conversion. This was not an automatic conversion as provided by s. 70 (repealed) of the Administration of Islamic Law (Selangor) En. 2/1989 that provides for automatic conversion of an infant child at the same moment as the muallaf father. Here the infant children became muallaf six days after the father converted to Islam. (pp 531 h & 532 a-b)

**[9]** As the law applicable to the infant children at the time of their conversion was the civil law and not the syariah law, the father though a muallaf had infringed s. 5 of the Guardianship Infants Act 1961. He should have consulted the mother before converting the infant children as the mother was still his legal wife. (pp 532 c-e)

**[10]** The *ex parte* custody order of the Selangor Syariah High Court was served on the mother after the father obtained the *ex parte* order which was given on an undertaking as to damages. This showed that the father acted in bad faith. (p 532 f)

**[11]** The infant children were now muallaf. They had been issued with temporary certificates of "Akuan Sementara Pengislaman". On the other hand, there was the present custody application by the mother in accordance with the Law Reform (Marriage and Divorce) Act 1976. In the circumstances, legal custody should be given jointly to both parents which meant that they had to discuss and agree on issues about the infant children, for eg, choosing the method of education, choice of religion and administrating the children's property. Actual custody that entailed daily care and control of the infant children should be given to the mother. However, the mother would lose the right to actual custody if there were reasonable grounds to believe that she would influence the children's religious beliefs, for example, teaching them the articles of her faith or making them eat pork. (p 532 g & 533 b-e)

**Case(s) referred to:**
*Gillick v. West Norfolk and Wisbech Area Health Authority [1986] AC 112* ***(refd)***
*J v. C 2 [1970] AC 668* ***(refd)***
*Re B [1962] 1 All ER 872* ***(refd)***
*Re D (Justices Decision Review) [1977] Fam 158* ***(refd)***
*Re JM Carroll [1931] 1 KB 317* ***(refd)***
*Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah [2004] 1 CLJ 505 HC* ***(refd)***
*Shamala Sathiyaseelan v. Dr. Jeyaganesh C Mogarajah & Anor [2004] 2 CLJ 416 HC* ***(refd)***
*Teoh Eng Huat v. Kadhi Pasir Mas & Anor [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC* ***(refd)***

**Legislation referred to:**
Administration of Islamic Law (Selangor) En. 2/1989, s. 70
Guardianship of Infants Act 1961, s. 5
Law Reform (Marriage and Divorce) Act 1976, s. 88

**Other source(s) referred to:**
Neil BE Baillie, *A Digest of Moohummudan Law*, Chapter VII, Second Section, p 95
Ahmad Ibrahim, *Family Law in Malaysia*, 3rd edn (1977), p 333

*For the plaintiff - Revi Nekoo (Parameswara & R Sivarasa); M/s Nekoo Parames & Tung*
*For the defendant - M Menon; M/s Jaffar & Menon*

*[The defendant has filed a notis of appeal on 28 July 2004.]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Faiza Tamby Chik J:**
This is an application made by the plaintiff non-Muslim wife (the mother) for custody, care and control of her two infant children, Saktiswaran aged four years two months and Theiviswaran aged two years eight months (the two infant children). The defendant Muslim husband (the father) converted the two infant children to Islam on 25 November 2002 without the consent and knowledge of the mother. The father became a Muslim on 19 November 2002. The mother is applying for the following relief:

(1) that the mother be given custody, care and control of the two infant children;

(2) that the father pays maintenance in the sum of RM1,500 each month for both the infant children until the two infant children attain the age of 21;

(3) that the father is given access to the two infant children at the mother's house every Sunday from 10am to 6pm in the presence of the mother.

The facts are straightforward. The father and the mother were Hindus. They were married in Dewi Sri Karumariamman Temple in Alor Setar, Kedah on 5 November 1998. The two infant children were also Hindus. They were born to a Hindu father and Hindu mother. The real trouble started between them when the father converted himself to Islam on 19 November 2002 and became a muallaf by the name of Muhd. Ridzwan bin Mogarajah. Six days later on 25 November 2002 the father converted the two infant children to Islam without the consent and knowledge of the mother. The two infant children became muallaf and Satiswaran is known as Muhd. Firdaus Jeya and Theiviswaran is known as Muhd. Asraf Jeya (see Akuan Sementara Pengislaman No. daftar 683/2002 and 684/2002 dated 25 November 2002). The father is a doctor attached to the Hospital Universiti Kebangsaan Malaysia (HUKM), Cheras, Kuala Lumpur. The mother is a clerk at Public Bank Berhad in Alor Setar, Kedah. From 1998 to September 2000 they were residing in Alor Setar Kedah. At or about September 2000 they moved to Kuala Lumpur because the father wanted to pursue his studies to specialise in the field of anaesthetic. The mother obtained a transfer from Public Bank from the Pokok Sena branch in Alor Setar to Taman Melawati branch in Kuala Lumpur. The mother is now back working in the Pokok Sena branch in Alor Setar. When she was working in the Taman Melawati branch the family was staying at No. 35, Jalan Koop Cuepacs 5B, Cheras, Selangor.

Now the background of the custody applications which were made by both the father and mother. The mother applied for custody of the two infant children *inter parte* in the Civil Court, Kuala Lumpur. The father applied for custody of the two infant children *ex parte* in the Syariah Court, Selangor. The mother made her custody application on 31 December 2002 in this High Court and served it on the father on 14 January 2003. The father made his *ex parte* custody application on 7 January 2003 in the Mahkamah Tinggi Syariah Selangor. The wife *inter parte* custody application came up for hearing for the first time on 16 January 2003. On that date the father applied and obtained a postponement in order for him to appoint an advocate & solicitor and the case was adjourned to 25 February 2003. I must pause here to stress that the father on 16 January 2003 when he applied and obtained a postponement to appoint lawyers was fully aware at that time that he had already filed his *ex parte* custody application in the Syariah High Court Selangor on 7 January

2003 and this said *ex parte* custody application was filed by the same advocates and solicitors handling his Syariah and Civil suits. In doing so he has misled this court. It is not disputed by both parties that the custody of the two infant children to the father was given by Mahkamah Tinggi Syariah Selangor is an *ex parte* order given on 30 January 2003 and is given on an undertaking as to damages by the father, which reads:

> (c) Plaintif (Muhd. Ridzwan bin Mogarajah) memberi akujanji akan mematuhi apa-apa perintah yang dibuat oleh Mahkamah mengenai gantirugi sekiranya Mahkamah mendapati bahawa kenyataan yang diberi oleh Plaintif dalam perjalanan kes ini adalah palsu.
>
> (lihat kes Mal. Bil. 10200-028-03/2000)

It is observed that the said *ex parte* custody order (hadanah) from the Syariah High Court was only served on the mother on 8 February 2003 ie, after getting the said order on an undertaking as to damages on 30 January 2003. It is as clear as day that the father only served the *ex parte* custody order after getting it from the Syariah Court *ex parte*. In this respect it is unmistakable that the said *ex parte* custody order was obtained without the knowledge and consent of the mother. This is crystal clear. The mother came to know about the custody suit in the Syariah High Court when she was served with the said order on 8 February 2003.

On 25 February 2003 the father, in relation to the mother's *inter parte* custody application made an application for postponement. The said custody application was then postponed to 17 March 2003. Finally on 17 April 2003 the court gave an interim order to the mother who due to the two infant children were then living with her in Alor Setar gave the father access to the two infant children from Saturday 1-2pm to Sunday 1-2pm; prohibited him from taking the two infant children out of Alor Setar and ordered the father to pay RM250 a month to each of the two infant children. On 8 May 2003 the father obtained a final custody order from the Syariah High Court Selangor. I am of the opinion that the said custody order from the Selangor Syariah High Court was given per in curiam; a decision which is mistaken, given without the said court's attention having drawn to the relevant authorities or statues especially s. 5 of the Guardianship of Infant Act 1961 (GIA 1961), which provides for equality of rights and authority to both parents. The special circumstances of this case are (i) initially both were Hindus, (ii) the two infant children were Hindus born to Hindu parents, (iii) the father converted to the Islamic faith under s. 51 of Act 164 which did not dissolve his Hindu marriage, (iv) however the mother who remained a Hindu may petition for divorce, (v) in this instant case the mother does not petition for divorce, (vi) therefore the Hindu marriage is still subsisting and valid. Therefore the father's obligation under the said Hindu

marriage would not and could not be extinguished or avoided by his conversion to Islam. In the premise I rule that the father though a muallaf now is subject to s. 5 GIA 1961. He cannot unilaterally convert the two infant children to Islam without the consent and knowledge of the mother. The established Islamic Law as prescribed by Hukum Syarak dictates that where one of the parents converts to Islam, the children automatically becomes Muslim. Al-Hadith as narrated by Al Hassan and Syuraih and Ibrahim and Qatadah that "if one of the parents of a child embraces Islam, therefore the child is (converted) with the parent who embraces Islam." (Fath Al Baari Bi Syarah Al Bukhary). However, in our case there is no automatic conversion. It is evidently clear that the two infant children were converted six days after their father's conversion. Therefore I am of the opinion that the conversion of the two infant children was not in accordance with established Islamic law as prescribed by Hukum Syarak (See Akuan Sementara Pengislaman No. Daftar 683/2002 and 684/2002 dated 25 November 2002). As far as I know there is no written law or fatwa in the Federal Territories which explicitly provide for "automatic conversion" of infant children. Another important aspect of this case is that both parents made custody applications in two different Courts exercising different jurisdictions. The fact of the matter is that both parents are still married to each other. Their civil marriage is still valid and subsisting. Therefore the general law of the land ie, s. 5 GIA 1961 is applicable to both parents. The Syariah High Court should take cognizance of this fact. Thus it is my opinion that the said custody order obtained by the father in the Syariah High Court Selangor dated 8 May 2003 is given per in curiam.

To recap and for the sake of clarity I have made the following decision in respect of this couple:

(1) 11 September 2003 – I ruled that the father's *ex parte* custody application in the Syariah High Court Selangor, tough endorsed by the Kedah Syariah Court (see exh. MK2 in the father's affidavit) was not binding on the mother because she is a Hindu and the said application is of no effect on her. I also decided that the Hindu marriage of the parties is not dissolved upon the father converting to Islam. It only provides a ground for the mother who has not so converted to petition for divorce. This is reported in [2004] 2 MLJ 241 and [2004] 1 CLJ 505.

(2) 13 April 2004 – I decided that the Civil Court has no jurisdiction to hear the mother's application for a declaration that the conversion of the two infant children to Islam by the father without her consent was null and void. I said only the Syariah Court had the competency and expertise to determine the said issue. This is reported in [2004] 2 MLJ 648 and [2004] 2 CLJ 416.

And this morning, 20 July 2004 I will decide on the inter party custody application of the mother.

The overriding principle in custody dispute is that the two infant children's welfare shall be the court's paramount consideration. In applying this principle the Family Court has a catalogue of relevant matters, though not exhaustive, it must look at, in particular:

(i) the ascertainable wishes and feelings of the two infant children; (s. 88(2)(b) Act 164);

(ii) the two infant children's physical, emotional and educational needs;

(iii) the likely effect on the two infant children of any change in circumstances;

(iv) the two infant children's age, sex and background and any characteristics the court considers relevant;

(v) any harm the two infant children have suffered or are at risk of suffering;

(vi) how capable each of the two infant children's parents is of meeting their needs;

(vii) the wishes of the parents of the two infant children (s. 88(2)(a) Act 164).

Lord Mc Dermott's attempt to define the meaning of "paramount" in *J v. C* 2 [1970] AC 668, 771 is instructive. I quote:

> The words must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby when all relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood. That is the paramount consideration because it rules on or determines the course to be followed.

The ascertainable wishes and feelings of the two infant children; this is ascertainable in the light of their ages and understanding. Although I have not interviewed the two infant children, nevertheless under s. 88(3) of Act 164 there shall be a rebuttable presumption that it is for the good of the two infant children below the age of seven years to be with their mother but in deciding whether that presumption applies to the facts of this case, the court shall have regard to the undesirability of disturbing their life by changes of custody. In

the instant case the two infant children have been in the physical custody of their Hindu mother since birth (except a brief period of about three months when the Muslim father took the children away from the Hindu mother relying on the Syariah Court custody order). Even though s. 88(3) is a rebuttable presumption I am of the opinion that strong grounds are required to rebut the presumption. Donovan LJ in *Re B* [1962] 1 All ER 872 where the child was four years old (as in the instant case) said:

> *Prima facie* a child of this age ought to remain with his mother and strong grounds are required to justify taking it away.

The two infant children have been in the care of their mother for a long period of time in Alor Setar, Kedah. Therefore I am of the view that it is usually in the two infant children's interest to preserve the *status quo* because there is likely to be an emotional trauma of a significant kind if these two infant children and mother relationship and the Alor Setar environment are changed on the transfer of the two infant children from the mother to the father in Kuala Lumpur. I have not interviewed the children but I have read the medical report on the two infant children prepared by Dr. Kasmini Kassim, a retired Professor of Child & Adolescent Psychiatry, Consultant Child and Family Psychiatrist from Damansara Specialist Hospital. (See Afidavit Jawapan (3) plaintif, exh. 'A' affirmed on 24 November 2003 – encl. 68). In gist the said reports stated the following:

(1) Saktiswaran is an intelligent boy. Theiviswaran merely follows whatever his brother says or does;

(2) Saktiswaran does not hate his father but is fearful of him;

(3) Saktiswaran does not want his new (Muslim) name or live with his father and father's lady friend;

(4) Saktiswaran does not want to follow his father in Kuala Lumpur or see his father in Kuala Lumpur unless his mother is with him;

(5) Saktiswaran does not mind his father visit him in Alor Setar;

(6) Saktiswaran does have a wish that his parents Appa and Amma should live together like before.

It is in evidence that Saktiswaran is attending the Super Kid Kindergarten in Alor Setar which is near the mother's home. This strengthen the mother's claim for custody. It must be acknowledged that changing the status quo will disrupt the two infant children and thus compound the difficulties of adjusting to their

parents' separation. So in this case the mother who is already looking after the two infant children will have a much stronger claim. I am of the opinion that the mother is the best able to care for the two infant children. Nothing in this world could replace the love of a natural mother to her natural children.

I am of the view that the two infant children's welfare is best protected by being with their mother rather than with their father. In this case it is evident that the father of the two infant children decided to leave and adopt a different lifestyle from the one the two infant children were familiar with. I would therefore take a critical view of it. It is evident here that the mother has in reality been the chief carer of the two infant children. She can offer a stable home life to the two infant children. In this case the father has walked out on the two infant children and put the interest of Ros Salina bt. Nayan above those of his two infant children. This is evidently stated in the affidavit Tambahan Plaintiff No. (2), No. (3) and No. (4) affirmed in Kuala Lumpur by Shanmuganathan a/l Selvadorai, Shamala a/p Sathiyaseelan on 29 January 2003, 6 February 2003 and 7 February 2003 respectively.

In the instant case the mother and the father decided to go their separate ways and the two infant children were caught in the middle as their mother and father argued over who is to have them. The court's paramount concern is for the welfare of the two infant children and not the hurt feelings and pride of the mother and father. In this case despite the conversion I am of the view that the two infant children's welfare is best protected by ensuring that they retain link with both their mother and father. I think despite the conversion the two infant children will cope much better with the trauma of separation if they continue to have regular contact with the father who leaves home as well as the mother who now looks after them on a day-to-day basis at home. In this way the two infant children will benefit from being given lots of reassurance by both their father and mother. This is because despite the relationship between the mother and the father has broken down, they will both still be there for the two infant children and that the two infant children know that they both still love them. It must be remembered that in the instant case the mother and the father are still husband and wife legally. Their marriage is still valid and subsisting in the eyes of the law. Although the mother is a Hindu and the father is a muallaf their marriage is still continuance under s. 8 of Act 164.

When custody or upbringing of a minor is the central issue the Court in deciding that question shall regard the welfare of the minor as the first and paramount consideration. It has been said that the welfare principle is applied "first, last and all the time" and that it is the "golden thread" which runs through the whole of the court's custodial jurisdiction. Dunn J in *Re D.*

*(Justices Decision Review)* [1977] Fam. 158, 163. Hence the dramatic effect of accepting this welfare principle is the erosion of the concept of the traditional view of the parental authority in that the parental authority diminishes as the minor becomes capable of reaching his/her own decisions. This means the minor's welfare overrides the wishes of his/her natural parents and the minor's welfare prevails over consideration of justice between his/her parents.

I am of the view that today parental authority should "yield(s) to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision." (see per Lord Scarman at p. 186 in House of Lords case of *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Whether a child has sufficient understanding and intelligence is a question of fact depending on the issues involved and the child's emotional and intellectual maturity. The older the child, the more persuasive his or her views. I am of the view that although children's views will be respected, they should not be forced to choose unwillingly between two people both of whom they love. My own experience after interviewing many children in the Family Court is that often children will say to me that they just want their parents to get back and live together like before.

Custody disputes were (as Scrutton L.J. put it in *Re J.M. Carroll* [1931] 1 KB 317, 331) for long primarily concerned, not with the body, but with the soul of a child. In the instant case both the two infant children have since birth have already embarked on and brought up in the Hindu religious belief by their Hindu parents until up to November 2002 when the father became a muallaf on 19 November 2002 and six days later on 25 November 2002 converted the two infant children (see temporary statutory conversion certificate No. 683/2002 and 684/2002 dated 25 November 2002). In the circumstances I will attach considerable importance to the continuance of the two infant children's religious belief since birth and will refuse to pass judgment on the conversion to Islamic faith of the two infant children. I must remind myself that the two infant children are still of impressionable age living with their Hindu mother. The pressures on them are quite sufficient especially when their father and mother are living apart and the father has left home and became a muallaf. In this case the court must take all relevant facts, relationships and claims and wishes of the mother and the father into balance and weigh them up in an attempt to reach the decision which will most serve the two infant children's welfare. That, said Lord Mac Dermott in *J v. C* [1970] AC 668, 771 "is the paramount consideration because it rules on or determines the course to be followed."

In this case, the two infant children were not born to a Muslim father. The father only became a muallaf on 19 November 2002 long after the two infant children were born, and about six days later convert them. In the circumstances I shall not insist on the identity of religion between the mother and her two infant children. We in Malaysia live in a multiracial, multireligious society and visit one another homes during the festive seasons always aware of one another sensitivities and yet living together harmoniously. We are known for our friendliness and hospitality. We respect our elders and courtesy is our way of life. I am of the opinion in the circumstances of this case, the mother is the best entitled to the custody of her two infant children. Nothing can take this away except her own misconduct and I think it makes no difference whether the mother is a Hindu or not. It must be emphasised here that the two infant children were not born to Muslim parents. Both parents were Hindus when the two infant children were born until the defendant father became a muallaf on 19 November 2002. And today the fact remains the father and the mother are still legally married to each other. Under s. 5 GIA 1961, both father and mother have equal parental rights and authority as the law allows on the two infant children.

Now I come to the question of religion of Islam. I am of the view that in proceeding relating to custody, care and control, the welfare of the child is paramount and the question of religion is merely one factor to be balanced against others when determining which parent should be given custody, care and control. It is not for the Family Court to prefer one religion to another. However, the Family Court can be permitted to examine the tenets and practices of a particular faith for the purpose of deciding the custody, care and control questions. Hedaya, the treasure of Islamic Jurisprudence, translated by Charles Hamilton in Chapter XIV p. 158 discuss the care of infant children (Hadanah – custody). It states:

> If a separation take place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother, because it is recorded that a woman once applied to the Prophet; saying "O Prophet of God! This is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care;" – to which the Prophet replied, "thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger" – moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child; and Siddeek alluded to this, when he addressed Omar on a similar occasion, saying "the spittle of the mother is better for thy child than honey, O OMAR" which was said at a time when

> separation had taken place between Omar and his wife, the mother of Assim, the latter being then an infant at the breast, and Omar desirous of taking him from the mother: and these words were spoken in the presence of many of the companions, none of whom contradicted him: – but the Nifka or subsistence of the child is incumbent upon the father, as shall be hereafter explained.

Neil B.E. Baillie in *"A Digest of Moohummudan Law"* in Chapter VII second section at p. 95 said, "With regard to custody of the child the mother has certainly a preferable right during the whole time of suckling (ie, two years) whether the child be male or female, provided that she is free and of the Muslim faith … After the child has been weaned the father has a preferable right to its custody if a male, and the mother if a female, until the child has attained the age of seven years."

Minhaj Et Talibin, a manual of Muhamadan Law according to the school of Shafie by Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi discuss custody of children on pp. 391 and 392 by stating, "By the education of a child is understood:

(1) Its supervision for all those matters in which it could not act for itself;

(2) The care given to it, and the cultivation of its mind.

> The first of these occupations is more particularly a woman's duty. It is confided first of all to the mother and her female ancestors through women, in order of proximity. … The education of a child can never be entrusted to (1) or a woman or a person of notorious misconduct, (2) an infidel if the child is a Moslem, (3) its mother, if she has married again. The education of a child implies also the duty of suckling it or having it suckled, if it is not yet weaned."

Tan Sri Datuk Professor Ahmad Ibrahim, the well-known and much respected Malaysian jurist in his book entitled *"Family Law in Malaysia"* 3rd edn, MLJ Sdn. Bhd. 1977 at p. 333 wrote:

> Under the Islamic law, custody is regarded as the right of the child and of the parents especially of the mother. The child needs someone to look after it and its needs and if the child is of tender years the mother is the best person to look after the child.
>
> It is reported from Abdullah ibn Amr that a woman complained to the Prophet (peace be upon him):

> 'Messenger of Allah my womb was a resting place of this son of mine, my breast a drinking place for him and my lap a soothing place for him, but his father divorced me and wishes to snatch him away from me.' The Messenger of Allah (peace be upon him) said: 'You have got more right to take him till you marry someone else.'
>
> (Sunan Abu Dawud, Kitab al Talaq, Vol.2, at p 616)

It is reported from Abu Hurairah that a woman came to the Prophet (peace be upon him) and said:

> 'O Messenger of Allah my husband wishes to go away with my son while he did me some service.' Then the Prophet (peace be upon him) said to the boy:
>
> > 'This is your father and this is your mother. Take the hand of either of them whom you like.' Afterwards the boy caught the hand of his mother.
> >
> > (Sunan Abu Dawud, Kita al Talaq, Vol.2, at p 617)

Yahya bin Said said that he heard Qasim bin Muhammad said:

> A woman of the Ansar was married to Umar ibn al Khattab. She bore him a son, Asim bin Umar and then he separated from her. Umar came to Quba and found his son playing in the courtyard of the mosque. He took him by the arm and placed him below him on his mount. The child's grandmother argued with Umar about the child, so they went to Abu Bakar as-Siddiq. Umar said the child was his son. The woman said he was her child. Abu Bakar asked Umar to leave the child and gave him to his grandmother.
>
> (Malik al-Muwatta, Kitabal-Rahn at p 331)

Syed Sabiq in his Fiqh-us-Sunnah refers to the decision of a case at Jirja, Egypt on 23 July 1933 where it was decided 'Both the persons who have custody and the child who needs custody have rights but the rights of the child is stronger than the right of the custodian. If the right of the custodian lapses, the right of the child does not lapse.'

The Sunni School is subdivided into:

(1) Hanafi (founded by Imam Abu Hanifa);

(2) Maliki (founded by Imam Malik);

(3) Shafie (founded by Imam Shafie), and

(4) Hanbali (founded by Imam Ahmad Hanbal).

These four great Imams were recognised as Mujtahids by the Muslims. There is not much difference in the fundamental Islamic principles enunciated by these four schools. As far as religion is concerned the Shafie require that no non-Muslim woman is qualified for the custody of a Muslim child born to a Muslim father. However in our case the two infant children were not born to a Muslim father. The father was still a Hindu when the two infant children were born. I am of the opinion that speaking generally, other Sunni jurists do not insist on the identity of religion between the mother and her infant children, provided that they shall be brought up in the faith of their father. Thus in our case if there are reasonable grounds to think that the non-Muslim mother would influence the infant two children's religious belief for example by teaching them her articles of faith or by making them to eat pork, then the two infant children shall be taken away from her. Otherwise, I am of the view that the mother is of all persons, the best entitled to the custody of her two infant children during the connubial relationship. Nothing can take them away from her, except her own misconduct and it makes no difference whether she is a Muslim or non-Muslim. According to Muslim jurists the right continues until the male infant children complete the age seven. After completing the age of seven years the father is entitled to the custody of the male infant children.

In the special circumstances of this case there is no reason to insist on the identity of religion between the non-Muslim mother and her two infant Muslim children. This is because the two infant children were born to Hindu parents. At birth their parents were Hindus. The articles of faith of both the parents are the Hindu faith and there are reasonable grounds to think that their parents would not influence their two infant children's religious belief other than those of their own articles of faith since birth. That is until the father became a Muslim and later converted the two infant children to Islam. Therefore there are no reasons to take them away from their mother just because the father became a muallaf on 19 November 2002 and converted them unilaterally to the Islamic faith later on 25 November 2002. I am of the opinion that the non-Muslim mother is entitled to the custody of her two infant Muslim children until they start to understand religious matters. I think the non-Muslim mother shall not lose her right to custody of her two infant Muslim children so long as there is no fear of her bringing them up according to a religion different from the father's.

In conclusion I wish to reiterate the main points of this case:

(1) The Hindu marriage between the non-Muslim mother and the Muslim father is still subsisting and valid;

(2) The two infant children were born to Hindu parents. Of course the father is now a muallaf, so are the two infant children;

(3) The two infant children were converted to Islam in a shroud of secrecy. I think there was a deliberate attempt to conceal the said conversion from the mother as shown by the following evidence:

(i) the "Alamat Tempat Tinggal" that appears in the Sijil Akuan Sementara Pengislaman of the two infant children is No. 22-6-6, Taman Midah Ria, Jalan Midah 8A, 56000 Kuala Lumpur (see exh. SS3 encl. 2);

(ii) This is not the "alamat tempat tinggal" of the two infant children. At no material time did the two infant children stay in this premise;

(iii) The mother's residential address at the time the two infant children were converted to Islam was No. 35, Jalan Koop Cuepacs 5B, 43200 Cheras, Selangor.

(iv) The address that appears on the Sijil Akuan Sementara Pengislaman is that of one Ros Salina binte Nayan, a friend of the father;

(v) The telephone number which appears on the Sijil Akuan Sementara Pengislaman ie, 012-3818779 belongs to Ros Salina binte Nayan. The father himself admits this in his affidavit affirmed on 25.3.2003, para. 10 which was filed *vide* Civil Suit No. S8-24-3586-2002.

(4) The custody order of Mahkamah Tinggi Syariah on 30 January 2003 was an *ex parte* order obtained by the father on an undertaking as to damages (see case Mal. Bil 10200-028-03/2003);

(5) Section 5 GIA 1961 gives both parents equal parental rights and authority in relation to the custody or upbringing of the two infant children. Therefore the right of religious practice of the two infant children shall be exercised equally by the mother and father;

(6) To my mind the law applicable to the two infant children at the time of their conversion is the civil law. See *Teoh Eng Huat v. Kadhi Pasir Mas & Another* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC. However in this case the father has unilaterally converted the two infant children soon after his conversion. This is not an automatic conversion as provided by

the repealed s. 70 of the Selangor Administration of Islamic Law Enactment 1989 which provides for automatic conversion of an infant child at the same moment as the muallaf father. The repealed s. 70 reads:

> If, at the moment of conversion to Islam, a muallaf whether male or female, has any natural child who has not attained the age of majority according to Hukum Syara' (baligh), the child becomes converted to Islam at the same moment.

In our case the father became a muallaf on 19 November 2002 and the two infant children became muallaf six days later, ie, on 25.11.2002. The two infant children did not become converted to Islam at the same moment as their muallaf father.

(7) The father though a muallaf now has infringed s. 5 of GIA 1961 ie, the law which is applicable to the two infant children at the time of their conversion, which is the Civil law not the Syariah law. (See the 5 panel coram of Supreme Court case of *Teoh Eng Huat* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277). The two infant children were still Hindus at that time of conversion. It must be borne in mind this is not an automatic conversion as envisaged by the repealed s. 70 abovementioned. The two infant children were converted six days after the father became a muallaf. Since s. 5 GIA 1961 is applicable the father should have consulted the mother before converting the two infant children. After all the mother is still his wife legally, then and still is;

(8) The *ex parte* custody order of the Mahkamah Tinggi Syariah Selangor was served on the mother after the father obtained the *ex parte* order which was given on an undertaking as to damages. This shows the father is acting in bad faith;

(9) Therefore the degree of attention I would properly pay to the conversion of the two infant children is as the circumstances of this case merited. However, I cannot run away from the fact that the two infant children are now muallaf. They have been issued with temporary certificates of "Akuan Sementara Pengislaman". On the other hand there is an application for custody of her two infant children by their natural mother. And the application is in accordance with Act 164 which is rightly so.

I am indebted to counsel on both sides including Mr. A. Kanesalingam of Kanesalingam & Co. and Ms. Foo Yet Ngo and Mr. Kan Weng Han as representatives from the Bar Council Family Law Committee who appeared as *amicus curiae*, for the assistance which they all have rendered to the court in this matter. I note that Mr. A. Kanesalingam is holding brief for the Malaysian

Counsultative Council of Buddhism, Christianity, Hinduism and Sikhism; Encik Haris Ibrahim and Ms. Sonia Anirudhan for Women's Aid Organisation (WAO), Sisters in Islam (SIS), All Women's Action Movement (AWAM) and Women's Centre of Change (WCC) and Ms. R. Kandiah for the Association for Women Lawyers (AWL).

For these reasons I would order custody, properly called legal custody jointly to both mother and father which meant that both parents had to discuss and agree on issues about their two infant children, for eg, choosing the method of education, choice of religion and administrating the children's property. In other words the right to take a long term decision that affect the two infant children. Care and control which covered the day to day care of the two infant children and the responsibility for looking after them daily would be given to the mother. This is called actual custody of the two infant children. Actual custody means the right to have the two infant children live with their mother. The daily care and control of the two infant children could not be shared. It is given to one parent alone. In the instant case I give it to the mother. I hope by doing this; legal custody to both father and mother jointly and actual custody to the mother alone, both parents are able to retain some influence over the two infant children and neither feel totally excluded. However, I must not lose sight of the fact that the two infant children are now muallaf, therefore the actual custody is given to the mother with the one caveat that she would lose the right to actual custody if there are reasonable grounds to believe that she would influence the children's present religious beliefs, for example teaching them the articles of her faith or making them eat pork. If the children have reached the age of discernment (mumaiyiz) they shall have the choice of living with either of the parents unless the court otherwise orders.

Since I have given care and control to the mother, I will allow the father to visit the two infant children. On 17 April 2003 my brother judge Raus Sharif J has given an interim order. In that interim order Raus Sharif J has allowed the father to visit the two infant children from 1-2pm Saturday to Sunday 1-2pm and the father is prohibited from taking the two infant children out of Alor Setar. However I note that the father did not return the two infant children on 25 May 2003. This was in breach of the said interim order. Therefore I hereby allow the father to visit the two infant children on alternative weekends from 1-2pm on Saturday to Sunday 1-2pm. starting from this Sunday 24 July 2004 and Sunday 25 July 2004. The father is still prohibited from taking the two infant children out of Alor Setar.

The father shall pay a maintenance in the sum of equivalent to 20% of his gross earnings plus paying actual education, medical and dental expenses until the two infant children attained the age of 21. This is because the two infant children are now muallaf. If the two infant children cease to be muallaf the duration of maintenance would be in accordance with s. 95 of Act 164 which would expire on the attainment by the two infant children of the age of 18 years. The said expenses shall be paid by the father on the production of receipts by the mother.

Each party will bear his/her own costs.